No. 9019

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LYON COUNTY BANK MORTGAGE CORPORATION (a corporation),
Appellant,

vs.

W. J. TOBIN, as Receiver of The Reno National Bank, of Reno, Nevada (a National Banking Association),
Appellee.

Upon Appeal from the District Court of the United States for the District of Nevada.

APPELLANT'S BRIEF.

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APPELLANT'S BRIEF.

BASIS OF JURISDICTION.

Lyon County Bank Mortgage Corporation, a corporation, appeals from the judgment entered September 8, 1938, in the District Court of the United States for the District of Nevada, Hon. Frank H. Norcross, United States District Judge, presiding, in the case of Lyon County Bank Mortgage Corporation, a corporation, complainant v. W. J. Tobin, as Receiver of The Reno National Bank, of Reno, Nevada, a National Banking Association, defendant. No. 2721 in

said court (Judgment Tr. p. 61) superseding the judg ment of September 2, 1938 (Tr. pp. 52-53) and th opinion and decision of June 16, 1938. (Tr. pp. 41-5 23 Fed. Supp. 763.)

Jurisdiction in the District Court is conferred b the Judicial Code, Section 24 (1) as amended. (Tit 28 U.S.C.A. 41 (1).) It is a "suit of a civil natu at common law". The matter in controversy exclusi of interest and costs, exceeds the sum or value o $3000 and it arises under the laws of the Unite States.

The value of the matter in controversy is set ou in paragraph XI of the complaint (Tr. p. 8) a $4736.90. See, also, counterclaim in answer, paragrap V (Tr. p. 25) drawing in question defendant's clair for $9316.94.

The defendant is sued "as Receiver," etc. Para graph VIII of the complaint alleges the insolvenc of The Reno National Bank on December 9, 1932 and the appointment of the receiver on that day b the Comptroller of the Currency of the United State pursuant to the laws of the United States and th continued status of the defendant as receiver. (Tr p. 6.) Such appointment, duties and powers are pro vided for by the National Bank Act (12 U.S.C.A Sec. 21 et seq.) with special reference to 12 U.S.C.A Sec. 191-192.

Reference is made again to paragraph V of the counterclaim (Tr. p. 25), claiming there is $9316.9 due from plaintiff to defendant. This constitutes a civil suit at common law by "any officer thereof"

(f the United States) "authorized by law to sue." (udicial Code Sec. 24 (1), Title 28 U.S.C.A. Section (1).) (Authority to Sue. Title 12 U.S.C.A. Sec. 1-192.)

This court has jurisdiction in this appeal by reason the Judicial Code Section 128, Title 28 U.S.C.A., ection 225, subdivision (a) First, and (b). There no direct review by the Supreme Court under the udicial Code Section 238 (Title 28 U.S.C.A. Sec. 5). No question of jurisdiction was drawn in issue exists. Appeal properly taken. (Tr. pp. 61-75 inc.) itle 28 U.S.C.A. 230; Federal Rules of Civil Pro-edure, Rule 73.

The judgment is one in the district court and ap-ears in the transcript, page 61.

STATEMENT OF THE CASE; QUESTIONS INVOLVED AND HOW RAISED.

There is one major question of law in the case and ne major question of fact. The question of law is rawn in issue by the pleadings and requests for find-ngs and judgment.

ssues tried.

As stated by the court in its opinion (Tr. p. 43), and as announced by counsel for the respective parties at the commencement of the trial, and as indicated by the letter from the Comptroller of the Currency to the defendant dated December 16, 1936 (Tr. pp. 162-6), the only issues presented to the court for determination were:

The question of law as to whether (1) under Sec. 53 of the Nevada Banking Act of 1911 no interest whatever could be demanded by the defendant upon his claim after the date of insolvency of the Lyon County Bank, as contended by the complainant, or whether (2) the rule recognized by *Gamble v. Wimberly* (44 Fed. (2d) 329) should apply and the defendant should be permitted to retain on account of interest on the main obligation such interest income as was earned by the underlying securities following the date of insolvency and as was collected by The Reno National Bank of the defendant receiver, as contended by the defendant; and

(A) If the court should hold in favor of the application of the rule in *Gamble v. Wimberly,* then the question of fact was presented as to the amount of interest so earned and collected and subject to such application.

1 (a) The pleadings draw in issue the question of law as follows:

Complaint. (Tr. pp. 1-10.)

Paragraph IV alleges the promissory note of Lyon County Bank.

Paragraph V alleges the collateral security agreements.

Paragraph VI alleges the insolvency of the state bank, February 16, 1932; the taking over and the knowledge of the creditor.

Paragraph VII alleges the nature of the creditor's claim setting out the amount claimed on principal as of June 1, 1932, at $58,150.34. (Tr. pp. 11, 16.)

Paragraph IX alleges the successorship of the complainant.

Paragraph X alleges:

> "* * * that on February 16, 1932, the amount owing upon the said promissory note of July 1, 1931, by said Lyon County Bank to said The Reno National Bank, including interest to that date, was the sum of Sixty-one Thousand One Hundred Five Dollars ($61,105.); and that the said Lyon County Bank was not otherwise indebted to said The Reno National Bank;"

Paragraph XI alleges that since February 16, 1932, payments aggregating $65,841.90 were received "on account of the indebtedness upon which the claim filed as aforesaid was founded; * * * that said defendant and said The Reno National Bank have received payment of the sum of Forty-seven Hundred Thirty-six and 90/100 Dollars ($4,736.90) in excess of the amount to which they were entitled, * * *"

Paragraph XII alleges that in addition The Reno National Bank retains certain collaterals.

The answer (Tr. pp. 23-25), paragraph I, admits that $65,841.90 has been received. It denies that the claim and indebtedness have been fully paid; "denies that defendant has received the sum of $4,736.90, or any sum, in excess of the amount to which he was entitled".

Paragraph IV of the counterclaim in the answer (Tr. p. 24) alleges that after applying $14,658.84 "to the payment of the interest due on said primary obligation of the Lyon County Bank up to said 21st day

of October, 1936 and the balance remaining after th application of the interest on said primary obligatio as aforesaid, said balance * * * reduced said indebted ness on said 21st day of October, 1936 to the sum o $9,316.94".

(This is equivalent to alleging that since July 1 1931, interest accrued on the note for $60,500.00 the amount of $14,658.84. Inasmuch as the interest o said note from date to February 16, 1932, wa $3025.00 the allegation asserts that since February 1(1932, the claim carried interest amounting t $11,633.84.)

In the reply (Tr. pp. 26-37) in paragraph I (Tr at p. 28, lines 1 and 2) it is alleged "no such interes could be paid from such insolvent estate, without mak ing a preference forbidden by law; * * *" and in paragraph IV the complainant repeats "That th actual primary obligation, including all interest du or allowable, was Sixty-One Thousand One Hundre Five Dollars ($61,105.)". This is repeated in th reply paragraph III (Tr. at p. 32) "That by reaso of the stoppage of interest by insolvency the primar obligation and valid claim never exceeded Sixty-On Thousand One Hundred Five Dollars ($61,105.)".

1 (b) The objections and requests respecting find ings also raise the question of law, as follows:

In the bill of exceptions (Tr. pp. 75-152) in para graph V of defendant's proposed findings (Tr. p. 126) the defendant incorporated the theory that interes accrued on the claim after February 16, 1932.

In the complainant's objections and proposed substitute findings (Tr. pp. 128-139) objection IV (Tr. . 130) was made to said finding V. Complainant proposed a finding V (Tr. p. 135) to effect that "The laim of The Reno National Bank on February 16, 932, the date of insolvency and taking over by the tate bank examiner, was $60,148.64 *and never increased thereafter*". (Italics ours.)

In the complainant's objections (Tr. pp. 142-148) o the court's findings of fact it was objected (Tr. pp. 45-146) that by reason of the provisions of Section 3 of the State Banking Act of 1911

> "no interest was chargeable or payable and no lien for interest was allowable, computed on the principal indebtedness as it existed on the day of insolvency, taking over and notice, respecting Lyon County Bank, as aforesaid. And no such interest or lien was payable or allowable because of the collateral-security agreements in evidence in this case which were entered into in contemplation of the provisions of said quoted statute."

Objection was also noted (Tr. p. 146) insofar as the court overruled and disregarded the objections and proposed findings previously submitted. (Tr. pp. 128-139.)

2 (a) The pleadings draw in issue the question of law (as to the application of avails) as follows:

The complaint, paragraph XI (Tr. pp. 7-8) alleges defendant received $65,841.90 since February 16, 1932, "and that said claim and indebtedness has been fully paid".

The answer, paragraph I (Tr. p. 23) denies this.

The counterclaim, paragraph IV (Tr. p. 24) alleges the indebtedness remains $9316.94.

The reply, paragraph III (Tr. pp. 32-33) alleges:

> "Complainant alleges that the said receiver, W. J. Tobin, without right, retained interest on collaterals accrued after insolvency of Lyon County Bank, amounting to Twenty-Nine Hundred Thirty and 75/100 Dollars ($2,930.75), but even in such case *he should have applied only Sixty-One Thousand One Hundred Five Dollars ($61,105.) to the claim against the insolvent bank estate and should have refunded Eighteen Hundred Six and 15/100 Dollars ($1,806.15) to the debtor, besides surrendering the remaining collaterals.* That there is no balance due on the primary obligation, or by reason of any valid claim either in the sum of Ninety-one Hundred Thirty-Six and 94/100 Dollars ($9,136.94) or in any other sum." (Italics ours.)

2 (b) The question of law is also raised by the objections and requests respecting findings.

Paragraph V of defendant's proposed findings of fact (Tr. p. 126) is based on the theory that interest avails from collaterals should be applied on the interest in the primary obligation and that principal avails from collateral should be applied on the principal of the primary obligation; and it states that this is what was actually done.

This was objected to by complainant, paragraph V (Tr. p. 130), on the ground that it is "not warranted by the evidence and is contrary to the evidence".

In paragraph VIII (Tr. p. 130) the conclusions of law were objected to on the ground "that they are not made from any valid finding of fact and are not based in fact or law".

In complainant's objections to the findings it is objected (paragraph V, Tr. p. 145):

> "Objects as a matter of law that even if a charge or lien for any such interest were not barred by statute, then The Reno National Bank would be permitted only to retain the collaterals and apply the interest avails on the collaterals (accrued and collected subsequent to the insolvency, to-wit, the sum of $2930.75) to the said alleged interest on the primary obligation and apply the principal-avails on said collaterals to the said alleged principal of the primary obligation, and it could not apply the principal-avails from the collaterals to the discharge of the alleged interest on the primary obligation, and it could not retain the collaterals any longer than until the principal of the primary obligation had been fully paid."

Objection was also made to the court's action on the former objections. (Tr. p. 146.)

A. The question of fact as to what sums were collected as avails from the collaterals and what were interest avails and what principal avails, conceivably would not arise at all on appeal, were it not for two mutually antagonistic findings of fact by the trial judge, which in themselves call for a directed finding and judgment. The undisputed evidence requires a directed finding and judgment for complainant.

It is conceded that the total sums collected as avails from the collaterals from February 16, 1932, to October 21, 1936, were $65,841.90 less $956.36 which was an offset.

There is a conflict in the findings as to how much of this sum was interest from collaterals and how much was principal from the collaterals.

In the final findings by the court of September 8 1938 (Tr. pp. 55-60), finding IV (Tr. pp. 57-58) was to the effect

> "Interest accrued and was collected and retained by the said bank and defendant, being *avails and proceeds from the said collaterals and securities* covering the period from February 16, 1932, to and including October 21, 1936, in the total amount of $2930.75 as follows, * * *" (Setting out the list, Tr. p. 58.) (Italics ours.)

Finding V immediately following (Tr. p. 58) is:

> "That payments aggregating the said sum of $65,841.90 were received by the defendant and The Reno National Bank since February 16, 1932 on account of the indebtedness upon which a claim had been filed by defendant, and that of said sum, the sum of $14,658.84 had been collected *as interest on said collateral securities* accruing after the date of insolvency of said Lyon County Bank." (Italics ours.)

The evidence supports finding IV and no evidence supports finding V.

The evidence consists of the testimony of witness Tobin (appellee) for complainant called as an ad-

erse witness (Tr. pp. 76-110); witness Blair for the omplainant (Tr. pp. 110-111) and witness Butler for efendant (Tr. pp. 111-114); plaintiff's exhibit No. (Tr. pp. 77-79); plaintiff's exhibit No. 2 (Tr. pp. 8-90); plaintiff's exhibit No. 3 (Tr. p. 89); defendnt's exhibit "A" (Tr. pp. 94-98); defendant's exibit "B". (Tr. pp. 100-103.)

In addition there was used as if an exhibit the abulation annexed to plaintiff's reply, denominated 'Exhibit A". (See Tr. p. 87.)

Appellee will doubtless agree that the court reporter's typewritten transcript from which the statement of evidence is summarized, shows on page 18, ine 9, that this "Exhibit A" is defendant's "file 2250" identified by the witness Tobin and pronounced o be correct.

It will be further noted that the testimony of witness Tobin (Tr. p. 81) was received in conjunction with plaintiff's Exhibit 2 (Tr. pp. 88-90; 158-160) and the court took the exhibit as controlling respecting the endorsements of interest and to what period. It is the only exhibit of the fact that is in evidence.

The tabulation from which witness Tobin testified recites two versions of the transactions recorded, both respecting the source of collected avails and the credits of the same on the obligation of the Lyon County Bank.

These recitals are of doubtful weight to show what happened or what should have happened.

These two records purport to account for $65,841.90. The record on collections excludes the $956.36 offset.

The records are as follows:

On collections from the obligors on the collaterals:

	Principal	Interest
Original	$59,702.62	$ 5,182.92
Revised	* 41,766.57	23,118.97

Note that the revision of collections takes $17,936.05 from the principal avails and attributes it to interest avails. A question of fact.

On credits to Lyon County Bank:

	Principal	Interest
Original	$60,499.00 (Bal. $1.)	$ 5,342.90 (on account)
Revised	$51,183.06 (Bal. $9,316.94)	$14,658.84

Note that the revision of credits takes $9315.94 from the credit on principal and credits it on interest.

By claiming a balance of $9315.94 the revision of credits increases the demand by that sum over the $65,841.90 already received in gross.

The revision of credits computes the gross obligation at $75,158.84 whereas the complainant computes it at $61,105.00 gross.

This difference of $14,053.84 lies in the final credit for $14,658.84 interest, less interest from December 31, 1931, to February 16, 1932, paid February 16 1932, amounting to $605.00.

*On the tabulation as of "2-6-33" this is $41,586.57 but there is an obvious omission of $180.00.

In addition there is a shift in the identity of the sums between the record of collections and the record of credits.

In the original record of collections and credits $159.98 is changed from principal character to interest character and in the revised record of collections and credits $8460.13 is changed from principal character to interest character.

The total of changes is $8620.11 and it accounts for the variance of $8620.11 between the revised collateral changes ($17,936.05) and the revised primary changes ($9315.94).

The tabulation therefore is but a "fable agreed on" and must give way to the facts as to what was done and the law as to what should have been done.

There are further questions as to the transactions after suit (filed April 2, 1937) was commenced. These relate to the transactions of October 29, 1937, and November 15, 1937, involving alleged collections of $1095.00 and $873.05 respectively. These are discussed in the argument.

ASSIGNMENTS OF ERROR RELIED ON.

Appellant relies on all the assignments of error which appear in the transcript, pages 63 to 68 inclusive, excepting only assignments VIII and IX which are now deemed argumentative.

Assignments I, II and III are general and ultimate and depend on the others.

Assignments IV, V and VI involve the general rule that interest on a claim stops with insolvency. They will be grouped together for argument.

Assignments VII and XIV involve the Nevada law forbidding a charge or lien for a liability incurred after insolvency and taking over of a state bank. They will be grouped together for argument.

Assignment X involves the contract of the parties in the light of the collateral security agreements of July 22, 1931.

Assignments XI and XIII involve the changed record of the transactions; the accounting by defendant; the legality of the defendant's application of avails from collaterals as credits on his claim and the court's refusal to find on this material issue. These will be grouped together for argument.

Assignment XII cites as error the trial court's refusal to make the special findings requested and asserts that the other findings not requested are not supported by the evidence.

SUMMARY OF ARGUMENT.

1. **Statement of facts.**
2. **Issues tried.**

The question of law is whether under the Nevada statute interest on a claim against an insolvent bank, computed over any period after insolvency can be charged or collected, and whether the rule requiring a ratable distribution to creditors permits any claim

to be increased by interest after insolvency, or permits a secured creditor to retain any interest collected from collaterals, other than the interest accrued and collected from collaterals after insolvency, applying all other collections from the collaterals to the reduction of the claim for principal alone, without interest.

The question of fact is as to the amount of interest accrued and collected from the collaterals after insolvency.

3. **Errors in the case.**

A. The court erred in permitting interest to be charged on the obligation after insolvency and added to the claim, contrary to the Nevada statute.

a. The Nevada statute is founded on the police power.

b. The case is governed by the Nevada statute solely and exclusively.

B. The court erred in permitting the claim of the secured creditor to be increased by interest computed over any period after insolvency and in permitting the secured creditor to retain any interest accrued and collected on the collaterals, except the interest accrued and collected on the collaterals after insolvency, and in not requiring all other collections on the collaterals to be applied on the claim without interest added after insolvency, all the same being contrary to the rule requiring a ratable distribution to creditors.

C. The collateral security agreements record the contract between the debtor and creditor and on the two possible interpretations thereof they impair the collection of interest on the obligation, in the light of both the law and the contract.

D. The attempted revision of the credits by way of a new record of collections and credits, was inadmissible and illegal and the issue of fact is to be decided according to what was done rather than on a tabulation purporting to record what was done. There is but one original note. (Exhibit "B", Tr. pp. 169-170.) Plf's Exhibit 1. (Tr. pp. 155-157.) There is but one document showing source of collections. (Plf's Exhibit 2, Tr. pp. 158-159-160.)

E. The special findings requested by the complainant should have been made by the court, because they were supported by the evidence and there was no evidence to support findings to the contrary.

F. The court should have decided the material issue as to the legality of the so-called revisions of the record as to the collections on the collaterals and the application of credits on the obligation. The allegations of fact in the answer to the counterclaim are not replied to and are to be deemed admitted.

G. The evidence shows that out of all the $65,-841.90 collected by The Reno National Bank and credited to Lyon County Bank, only $2930.75 was avails by way of interest on collaterals realized in the period from February 16, 1932, to October 21, 1936. That if interest on a secured obligation does not stop with insolvency, said sum of $2930.75 only,

s creditable upon said interest, the balance is credi-able upon the principal, and the secured creditor must account for the overplus and the unexhausted collaterals.

ARGUMENT.

This cause was tried on March 18, 1938, before the court without a jury, resulting in a judgment that the plaintiff (appellant) take nothing and that the defendant (appellee) recover his costs. The situation presented to the trial court was as follows:

STATEMENT OF FACTS.

Lyon County Bank was a corporation organized under the Nevada Banking Act of 1911 and was engaged in the general banking business at Yerington, Nevada. On July 1, 1931, the Lyon County Bank borrowed the sum of $60,500 from The Reno National Bank, a national bank, with its principal place of business at Reno, Nevada, giving its promissory note therefor, bearing interest at the rate of eight per cent. per annum.

On July 22, 1931, the Lyon County Bank executed and delivered three certain collateral security agreements (Tr. pp. 16, 18 and 20) to The Reno National Bank and delivered and deposited with the said bank as a part of the transaction the following described property, to-wit:

6—$1,000.00 First Lien Coupon Certificates of the Mortgage Security Corporation of America.

22—$1,000.00 par value Walker River Irrigation District 6% Bonds.

Note of Loraine L. & J. Wedertz for $5,000.00, dated May 15, 1931.

Note of Elmer S. & Cora H. Wedertz for $7,300.00, dated Feb. 27, 1931.

Note of H. E. & Roena W. Carter for $5,500.00, dated May 1, 1931.

Note of Montelatici et als., for $8,000.00, dated June 20, 1930.

Note of David Jones et als., for $16,500.00, dated Feb. 27, 1930.

Note of Yparraguirre, P. M. & Bertha, for $24,800.00, dated June 15, 1931.

Together with mortgages given to secure the payment of each of the six above described promissory notes.

On December 16, 1931, the Lyon County Bank paid to The Reno National Bank $2,420.00 as interest on the $60,500.00 loan, which paid the interest to January 1, 1932.

On February 16, 1932, it was found that the Lyon County Bank was insolvent, and on the last mentioned date the bank was taken over by the state bank examiner. Thereafter, during the liquidation, pursuant to judgment and decree entered October 26, 1933, in the First Judicial District Court of the State of Nevada, in and for Lyon County, and in conformity with the provisions of the state banking laws relating to banks and particularly the Banking Act of 1933, the bank examiner conveyed and set

over all the property of the Lyon County Bank to the Lyon County Bank Mortgage Corporation, a statutory (Nevada) liquidating corporation, which comprises the creditors of the said insolvent bank. The Lyon County Bank Mortgage Corporation is the complainant and appellant.

At the time of the closing of the Lyon County Bank there was accrued and unpaid interest for one and one-half months on the note of $60,500.00 amounting to $605.00, making a total of $61,105.00 unpaid on principal and interest due The Reno National Bank on the day the Lyon County Bank closed. On the same day, February 16, 1932, the insolvent bank had on deposit with The Reno National Bank, as a correspondent, $956.36. This sum of $956.36 was thereafter, on March 3, 1932, applied as an offset on account by The Reno National Bank. Applying the offset on the date of insolvency, it would result in the sum of $60,148.64 principal and interest unpaid to The Reno National Bank on that date. On September 1, 1932, The Reno National Bank filed with the state bank examiner its claim for $58,150.34 principal as of June 1, 1932, against the Lyon County Bank, Exhibit X of the complaint. (Tr. p. 11.)

In explanation of the reference in the claim to the F. W. Simpson note of $5,000.00, may we say that this was a separate transaction and that this note was paid in full and hence is eliminated from consideration in the instant case, except to this extent: On August 13, 1932, the state bank examiner remitted to The Reno National Bank funds of the Lyon County Bank in the sum of $110.00 to pay interest on the

Simpson note then held by The Reno National Bank. As it happened, however, Simpson had previously made remittance to The Reno National Bank of this installment of interest. The Reno National Bank thereupon appropriated the state bank examiner's remittance and applied it on account of *interest* on the $60,500.00 note.

The Reno National Bank closed its doors on or about October 31, 1932, and W. J. Tobin was appointed as receiver on December 9, 1932, or thereabouts, and since that time said bank has been in liquidation.

At various times The Reno National Bank and its receiver collected divers sums from the securities deposited with it by the Lyon County Bank, as principal and interest, and applied the same specifically as brought out in the testimony. (Tr. pp. 38 and 39.) The amounts so collected aggregated $65,731.90, which with the Simpson item of $110.00 added amounts to $65,841.90, as of October 21, 1936. As these payments were received they were applied by The Reno National Bank and its receiver against the $60,500.00 note as follows: $60,499.00 account principal, and $5,342.90 account interest.

Subsequently, following a demand on the part of the Lyon County Bank Mortgage Corporation for an accounting, the defendant receiver attempted to make a revision of the credits upon the primary indebtedness of $60,500.00 and also upon the underlying securities, even though most of the underlying securities had been settled and returned to the makers upon the basis of the original application of payments.

Under the plan of revision as adopted by the receiver the amount of interest endorsements upon the sub-collateral or underlying securities was increased from $5,182.92 to $23,118.97 (Tr. p. 39), and the amount appropriated as interest against the primary obligation was increased from $5,342.90 to $14,658.84. (Tr. p. 39.) Also, the balance due upon the primary obligation was increased from the sum of $1.00 to the sum of $9,316.94. (Tr. p. 38.)

As a matter of fact, however, the amount of interest on the underlying securities which accrued after the date of closing of the Lyon County Bank and which was collected by The Reno National Bank or its receiver was not the sum of $5,182.92, nor the sum of $23,118.97, nor the sum of $14,658.84 referred to by the court (Tr. pp. 39 and 58), but the total amount so accrued and collected was the sum of $2,930.75. (Finding IV, Tr. pp. 57-8.) (See Plaintiff's Exhibit 2, Montelatici interest credits. (Tr. pp. 158-160.))

In addition to the above, the defendant, on October 15, 1937, collected on the pledged security of E. S. Wedertz the sum of $1,095.00, and on October 29, 1937, the defendant collected on the pledged security of H. E. Carter the further sum of $873.05, or $1,968.05 in all, making a total of $67,809.95 received by The Reno National Bank and its receiver, or $6,704.95 in excess of the $61,105.00 due at the time of the closing of the Lyon County Bank.

(Note. The court found (Finding VII, Tr. p. 59) that on October 29, 1937, the defendant col-

lected from Carter the sum of $1,625.99. Unfortunately such was not the case. The sum of $1,625.99 represents the balance shown by the exhibit (Tr. p. 38) to have been due on the Carter paper as principal on October 21, 1936, after the so-called revisions had been made by the defendant, but the defendant, on October 29, 1937, accepted from Carter the sum of $873.05 in full settlement of his obligation and cancelled and returned his note. (Tr. pp. 108-10.) However, the sum of $1,625.99, together with interest on that amount at 8% per annum, less the sum of $873.05, forms a part of the sum of $9,316.94 claimed by the defendant to be due as a result of the revised setup.)

The defendant still has in his possession not only the above-mentioned sum of $6,704.95, but also certain securities, as follows:

The E. S. Wedertz note of February 27, 1931, for $7,300.00 which, according to the defendant's testimony (Tr. p. 91), carries an unpaid balance of $1,150.93 principal, with interest at the rate of 8% per annum paid to February 22, 1933;

Also, the E. S. Wedertz note of February 21, 1933, for $1,794.00, which, according to the defendant's testimony, carries an unpaid balance of $1.00 principal, with interest on $1,794.00 at 8% per annum from February 21, 1933 to October 21, 1936;

Also, the P. M. Yparraguirre note of June 15, 1931, in the principal amount of $24,800.00, with interest at 8% per annum, and bearing certain endorsements.

On January 4, 1936, the defendant had been paid a total of $62,290.83 upon its claim (computed from figures shown on Tr. pp. 156-7), being $1,185.83 in excess of the amount due on February 16, 1932, when the Lyon County Bank closed. Subsequent payments were made to the receiver as follows:

On January 16, 1936, by Philatro & Jones	$ 100.00
On October 21, 1936, by E. S. Wedertz	1,928.07
On October 21, 1936, by H. E. Carter	1,523.00
On October 15, 1937, by E. S. Wedertz	1,095.00
On October 29, 1937, by H. E. Carter	873,05

The indebtedness to The Reno National Bank was incurred by the Lyon County Bank after July 1, 1931, except by way of interest which thereafter accrued to February 16, 1932, upon the $60,500.00 note bearing that date and also except in connection with the Simpson transaction of October 1, 1931, which is removed from consideration in the instant case.

ASSIGNMENTS VII AND XIV. (Tr. pp. 66, 67, 68.)

VII.

The court erred in finding and adjudging that interest computed on the indebtedness of Lyon County Bank to The Reno National Bank, as it stood on the day the Lyon County Bank became insolvent and was taken over by the State Bank Examiner to the knowledge of The Reno National Bank was not a "liability thereafter incurred" or that it was not such a liability respecting which Section 53 of the State Bank-

ing Act, approved March 22, 1911 (N. C. L. 1929, Sec. 702) provides among other things that

> "* * * No bank, corporation, firm or individual, knowing of such taking possession by the examiner, shall have a lien or charge for any payment, advance or clearance thereafter made, or liability thereafter incurred against any of the assets of the bank of whose property and business the examiner shall have taken possession as aforesaid. * * *"

XIV.

The court erred in refusing and failing to give effect to the provisions of Section 35 of the Banking Act of Nevada of 1911 being N. C. L. 1929, Sec. 664, and in finding and deciding and adjudging that to pay interest on the indebtedness of the Lyon County Bank to The Reno National Bank as it stood when the Lyon County Bank became insolvent and was taken over by the bank examiner, would not constitute giving a preference to a creditor, which is prohibited by law.

(1) The right of The Reno National Bank against the Lyon County Bank by reason of its contractual relations began July 1, 1931, and became converted into a right to have a claim against the assets of the Lyon County Bank as of February 16, 1932, the date the latter bank was closed by virtue of the banking laws and the state bank examiner took possession with notice to The Reno National Bank.

(2) Such claim, net, on and after February 16, 1932, was fixed and frozen in the sum of $60,148.64,

and no lawful charge for interest could be made or paid thereon because there was not found enough assets of the insolvent to pay all claims of all creditors and depositors with interest thereon.

(3) Sec. 53 of the State Banking Act (N. C. L. 1929, 702) provides that no interest shall be allowed after examiner takes possession of a state bank. This provision of the state law was a part of the original contract between the parties and effective at all times. Interest on the balance of the unpaid note stopped on February 16, 1932.

The Lyon County Bank was organized under the Nevada law and was a "creature of the banking act" of 1911 (N. C. L. 1929, 650).

Lyon County Bank v. Lyon County Bank, 60 Pac. (2d) 610.

The Nevada Banking Act of 1911, still in full force, effect and virtue on February 16, 1932, when the state bank examiner took charge of the Lyon County Bank, as insolvent, undoubtedly applies. The bank was organized under the Nevada law, under the provisions of the particular Act and these provisions relating to distribution of assets and the conduct of the bank were in force and effect throughout its operating life and at the date of its untimely closing. Attention is directed particularly to the following sections of the 1911 Act:

> Section 35 (N.C.L. 1929, 684). "No bank official shall give preference to any depositor or creditor by pledging the assets of the bank as collateral security, or otherwise; provided, * * *"

Section 53 (N.C.L. 1929, 702) "* * * No bank, corporation, firm or individual knowing of such taking possession by the examiner, shall have a lien or charge for any payment, advance or clearance thereafter made, or liability thereafter incurred against any of the assets of the bank of whose property and business the examiner shall have taken possession as aforesaid. * * *"

Section 72 (N.C.L. 1929, 721) "The powers, privileges, duties and restrictions conferred and imposed upon any corporation or individual, existing and doing business under the laws of this state are hereby abridged, enlarged or modified as each particular case may require, to conform to the provisions of this act, notwithstanding anything to the contrary in their respective articles of incorporation or charters. The legality of investments heretofore made, or of transactions heretofore had, pursuant to any provisions of law in force when such investments were made or transactions had, shall not be affected by the provisions of this act, except as the same can be done gradually by the sale or redemption of the securities so invested in, in such manner as to prevent loss or embarrassment in the business of such corporation or individual, or unnecessary loss or injury to the borrowers on such security; provided, all investments, transactions, loans, and requirements shall be made to conform to the provisions of this act, within the period of eighteen months from the time of the enactment thereof."

The Act of 1911, Sec. 35, forbids any bank official to give preference to anyone, in the manner specified, "or otherwise". The phrase "bank official" as used

may well include not only a bank officer of a going bank, but also any public official having to do with the administration of the banking law. A bank official may not by any device give to a creditor a preference, through a contract, waiver or otherwise, contrary to the banking act, which would result in an inequality and partiality of treatment as between that creditor and all other creditors, on insolvency.

Dellamonica v. Lyon Co. Bank M. Corp. (Nev.), 78 Pac. (2d) 89;

Crystal Bay Corp. v. Schmitt (Nev.), 81 Pac. (2d) 1070;

Crystal Bay Corp. v. Schmitt, on rehearing, (Nev.), 83 Pac. (2d) 464-467.

Section 53 denies to all creditors any "lien" or "charge" by reason of any payment, advance or clearance made "or liability thereafter incurred" against any of the assets of the bank whose property and business the bank examiner shall have taken possession. This denial dates from that taking. It draws the line between a creditor's rights while the bank is a going concern, and his rights when the bank is in custody of the law. It not only abolishes a charge or lien against a closed bank but it also abolishes "any liability thereafter incurred" against any of the assets of the bank. The language is the creditor shall not "have" a lien or charge for any payment or advance or for any "liability thereafter incurred". The plain meaning is that if any liability is "incurred" after notice of closing no charge shall be made and no lien shall attach against the assets of the closed bank.

Interest is a sum paid for the use of money. It is in the nature of damages for properly or improperly withholding a debt beyond the time when it ought to be paid. Men contract debts but they "incur" liabilities.

A charge or lien for a liability incurred for interest is incurred, accrues, or is brought on only by the lapse of time.

A charge or lien for a liability "incurred" for rent of realty is incurred or brought on only by the running of a certain number of days or months of use. The amount in either case is computed by considering the rate of hire and the lapsed time. The bar upon interest dropped when the bank was closed and the examiner took charge under the Banking Act. A stated amount of principal was then due and a certain amount for interest had accrued; additional interest thereafter would be a "liability thereafter incurred" and comes directly under the statutory inhibition.

Section 72 of the 1911 Act makes the Act apply notwithstanding any provisions in the charter of the bank. While this section may be difficult as to past transactions, it is carefully worded on that point. But as a rule of future guidance passed in 1911, before this bank was incorporated under its provisions and before the national bank made its contract with the Lyon County Bank, it is paramount. Any contract made by this debtor and creditor after March 21, 1911, would adopt and be bound by this Act in all respects. This is pointed out by Judge Ross in the *Washington-Alaska* case and that case went off on the point in the

majority opinion on the score that the regulation of the business of a Nevada bank doing business in Alaska was not the concern of the Nevada laws.

Notwithstanding the applicable and exclusive provisions of the Nevada Act of 1911 the creditor bank here made and claimed and makes and claims a charge and lien on the assets of this closed bank as for a liability for interest that confessedly was "incurred" after the bank closed. Any charge for the use of the money beyond that time must necessarily be measured, earned and brought on by the continued prolongation of the rental period. The statute denies the liability. It forbids the charge, withholds the lien.

THE NEVADA LAW IS FOUNDED ON THE POLICE POWER.

State v. Wildes, 37 Nev. 55.

"As often held by this and other courts, the banking business is so essential to the public welfare that laws may be passed for its regulation. Decisions holding that the state has no interest or power to appear after the appointment of a receiver in actions pending for the liquidation of insolvent banks were made in cases where there was no statutory provision similar to the one passed at the last session of the legislature authorizing the attorney-general to appear in the action after the appointment of a receiver, and in cases decided before the decisions of the Supreme Court of the United States upholding the bank guaranty laws in Oklahoma, Kansas, and Nebraska. (Noble State Bank v. Haskell, 219 U.S. 112, 31 Sup. Ct. 186, 55 L. Ed. 112, 32 L.R.A.n.s.

1062, Ann. Cas. 1912A, 487; Shallenberger v. First State Bank, 219 U.S. 116, 31 Sup. Ct. 189, 55 L. Ed. 177; Assaria State Bank v. Dolley, 219 U.S. 122, 31 Sup. Ct. 189, 55 L. Ed. 123.) In these decisions, overruling earlier ones of some of the intermediate federal and state courts, the Supreme Court of the United States held that the laws requiring all state banking institutions to contribute to a fund to be handled by a commission or under state authority, and to be applied to the payment of the claims of depositors in insolvent banks, were constitutional.

"The sustaining of these laws was in effect a holding that the state, under the police power, may continue to protect the depositors even after the bank has failed, instead of leaving him to hire his own attorneys and to be required to pursue his own methods to protect his interests. It being settled by the Supreme Court of the United States that the state may do this, it follows that the state has control of the banking business under the police power, and that it may authorize its attorney-general or other officer to protect the interests of depositors in defunct banks; and consequently, from the time of the passage of the act of March 24, 1913, the attorney-general was authorized, under the broad powers given him by that statute, to intervene or proceed in the action, whether it be considered for the protection of the depositors or for the benefit of the state."

(Paragraphs 5 and 6 of the opinion, Talbot, C. J.)

"The right of the state to exercise control and supervision in matters of this character cannot, in the light of modern thought and reasoning, be

questioned. When the legislature, speaking for the policy of the state, enacts laws which tend to protect the people in general, or great numbers of the people, when it seeks to enhance public welfare by enacting laws tending to safeguard and promote business and commercial conditions, the ultimate aim and object of such laws should not be lost sight of. Enacted and maintained by reason of the police powers of the state, such laws should be operated and construed to the end that their spirit might be applied, even though in letter they may appear limited or defective."

(Same case, page 68, concurring opinion, McCarren, J.)

CONTRACTS ARE MADE IN THE LIGHT OF EXISTING LAW AND POLICE POWER AND THE LAW BECOMES PART OF THE CONTRACTS.

Tonopah Sewer & Drainage Co. v. Nye Co., 50 Nev. 173.

See Opinion, pages 178-179.

"It then follows that the public service commission, in establishing the rate on the public buildings in question here, acted not only in accordance with the power vested under the acts creating it, but in accordance with the contract itself." (P. 179.)

See also:

Gill v. Paysee, 226 Pac. 302, 48 Nev. 12;

Pinney & Boyle Co. v. Los Angeles Gas & Elec. Co., 141 P. 620, Opinion, sec. 5, p. 622;

City of Woodburn v. Public Service Commission, 161 P. 391, Opinion, sec. 1, p. 393.

See also:

Const. Nevada, Art. VIII, sec. 1 (N.C.L. Sec. 131.)

THE NEVADA ACT OF 1911 IS INCLUSIVE OF THE WHOLE BANKING SUBJECT AND EXCLUSIVE OF ALL OTHER LAW, STATE OR FEDERAL.

Greva v. Rainey (Cal. App.), 33 P. (2d) 697.

"Bank Act is to be construed as being inclusive and exclusive of law applicable to bank in liquidation. (Gen. Laws 1931, Act 652.)

Syllabus 2.

"Bank Act covers entire field of law respecting insolvent banks, and therefore previous provisions of either common or statutory law in conflict therewith is no longer operative. (Gen. Laws 1931, Act. 652.)

Syllabus 4.

"Statutory procedure for liquidation of bank must be followed. (Gen. Laws 1931, Act 652, §136, par. 2; §136a.)

Syllabus 5.

"Where that rule obtains it is manifest that the liquidating officer is an administrative government officer of the federal government, or of the state government under which he was appointed, and that his powers and duties are those prescribed in the bank statute and not otherwise. Port Newark Nat. Bank of Newark v. Waldron (C.C.A.) 46 F. (2d) 296."

Opinion, page 699.

See companion case of:

Wood et al. v. Rainey, Supt. of Banks, 33 P. (2d) 702 (Cal. App.).

"Liquidating agent of bank *held* not entitled to pay claimants interest after date Superintendent of Banks took charge, but claimants when paid full amount due on such date were 'paid in full' within Bank Act. (Gen. Laws 1931, Act 652, §136.)"

Syllabus 1.

See on hearing in Supreme Court:

Greva v. Rainey, Wood et al. v. same, 41 P. (2d) 328.

"Bank Act being silent as to interest, depositors in commercial department *held* not entitled to recover interest during liquidation of bank before payment of claims of depositors in savings department, since all creditors of insolvent debtor should be treated equally, unless statute provides otherwise. (St. 1909, p. 93, §26; St. 1913, pp. 150, 151, §§24, 27; St. 1921, p. 1370, §23.)

Syllabus 3.

"The decisions, including those hereinabove cited, are uniform to the effect that in so far as is possible the creditors of an insolvent debtor must be treated on a basis of equality. See, also, White v. Knox, 111 U.S. 784, 4 S. Ct. 686, 28 L. Ed. 603; Thomas v. Western Car Co., 149 U.S. 95, 116, 117, 13 S. Ct. 824, 37 L. Ed. 663. That, indeed, is the premise from which springs the rule that interest ordinarily will not be computed nor paid from the date of the suspension of business, or commencement of the receivership or other liquida-

tion procedure. Therefore, there being but one debtor involved, all creditors are entitled to equal consideration except where the statute expressly provides otherwise, and then only to the extent provided. It follows that the fact that section 27 required the assets of each department to be held solely for the 'repayment of the depositors' of that department is not to be held to enlarge the rights of such depositors so as to include interest when the act is silent on the matter and otherwise interest would not be recoverable. The reasoning to be applied when the question is one of interest as between creditors is stated in People v. American Loan & Trust Co., supra, viz.: 'Interest should not run in favor of one creditor at the expense of another, while the law, acting for all, is administering the assets.' ''

Opinion, pages 331, 332.

Cited:

Ledford v. Skinner (June, 1937), 156 Oregon 656, 69 Pac. (2d) 519.

We cite also: *In re Frasch,* 31 P. 755 (Wash.), following the state law respecting insolvencies, to the disregard of the national bank act and the national bankruptcy act.

First National Bank of Seattle v. Mansfield State Bank (Wash.), 221 P. 595, reaffirming the decision in *In re Frasch,* 31 P. 755.

Beaver County v. Home Indemnity Co., 52 P. (2d) 435-458:

"Ruling that county was general creditor as against assets of closed bank to extent of prin-

cipal indebtedness when bank closed together with accrued interest *held* error, since interest does not run after declared insolvency unless there are sufficient funds on hand to pay all of the demands and accrued interest."

Syllabus 36.

First Wisconsin Nat. Bank of Milwaukee v. Kingston, Commr. of Banking, 252 N.W. 153 (Wis.), 94 ALR 465-468:

"It is conceded that the enactment of chapter 477, Laws 1933, making applicable to bank liquidations the bankruptcy rule, came too late to affect this case. It is suggested by defendant that the enactment of this chapter indicates the view of the banking department and of the Legislature that the bankruptcy rule is the equitable and fair rule. However, the Legislature has not seen fit to modify the equity rule until the enactment in question, and then has modified it only in so far as bank liquidations are concerned."

Opinion at 94 A.L.R. 468.

(The court rejects the Wisconsin statute only because it was not passed in time. In Nevada the legislature has "seen fit" in 1911 to enact a law and it is exclusive.)

Instances where the state courts in cases involving a state debtor, not a national bank and not a bankrupt, have construed the state laws in their search for an equality of treatment to creditors, are cited below:

Broadway-Main St. Bridge Dist. v. Taylor (Ark.), 57 SW (2d) 1041;

Louisville v. Fidelity & Columbia Tr. Co. (Kentucky), 54 SW (2d) 40;
Re Victor (New York), 166 N.Y. Supp. 1012.
See notes 94 A.L.R. pp. 473-474.

"The Bank Act, chapter 8 of the Revised Code of 1928 (sections 209-272), under which proceedings for the liquidation of insolvent banks are authorized, gives us no key to the solution of the question."
Re Prescott State Bank's Estate, Simms, State Treasurer v. Button, etc. (Ariz.), 3 P. (2d) 788 at 790.

(The court first searched for a state law applicable.)
U. S. Fidelity & Guaranty Co. v. Malia Bank Commissioner, 49 P. (2d) 954 (Utah).

The court in this case construed the Utah bank act and came to the conclusion that a secured creditor must surrender or account for the value of his collaterals at the time of insolvency, apply the avails on the claim as fixed on closing, without added interest, and then might receive dividends on the balance remaining unpaid on the original claim.

The court declared its duty to "give effect to whatever legislative intent may be found expressed in our statutes". It cited R. S. Utah 1923, c. 2, tit. 7, including sections 7-2-15. "No preferences or priorities shall be given to any claim;" 7-2-16 shall "declare one or more ratable dividends".

"The clear import of these sections is to fix equality in the treatment of claims and in the declaration of dividends thereon. In no other way could ratable dividends be declared, there being no exception provided for."

49 P. (2d) at 956, col. 2.

In *State v. State Bank of Alamogordo,* 32 P. (2d) 1017 (N. Mex.), the court sought the ruling law, Comp. Stat. 1929, Secs. 32-194, holding however:

"The courts of these states mention the fact that there is nothing in their banking acts or insolvency statutes controlling the matter. So it is with us. Our general corporation insolvency act directs a ratable distribution of the assets of the insolvent, although recognizing the superiority of prior liens. Comp. St. 1929, §§32-194. Substantially the same provision in the National Banking Act was involved in the decision of the Merrill Case adopting the equity rule."

32 P. (2d) 1019, col. 2.

The court then construed the general corporation insolvency act of New Mexico in the absence of a provision in the banking law of that state, and reasoned from decisions in national bank cases because the National Bank Act was similar to the state corporation act. Had there been a banking act like the Nevada act of 1911 denying a charge or lien by reason of any liability incurred after the insolvency, the task would have been simplified.

The New Mexico court was urged to decide the case on the basis of New Jersey decisions inasmuch as the Corporation Insolvency Act adopted by the territorial

legislature in 1905 was taken from New Jersey. But the court declined to do so for the reasons that the decisions relied on were made after New Mexico adopted the New Jersey act.

Commerce Trust Co. v. Farmers Exchange Bank, 61 SW (2d) 928 (Mo.); 89 A.L.R. 379, sec. 3.

"Statute relating to department of finance and banking institutions provides exclusive scheme for liquidation of insolvent banks. (Rev. Stats. 1929, Secs. 5333, 5337, 5339, 5340.)"

Syllabus 3-61 SW (2d) 928.

Citing also:

Bowerstodk Mills, etc. Co. v. Citizens Trust Company, 298 S.W. 1049 (Mo.), to effect that the banking statute (R.S. 1919, 11716 etc.) is an exercise of the police power.

In the above *Commerce Trust Company* case it was held that, despite all other statutes, it was fatal to present claims too late when the bank act prescribed the time within which they must be filed.

City of Louisville v. Fidelity and Columbia Trust Co., et al., 54 SW (2d) 40 (Ky.), cited before,

also holds that statutes authorizing banks and trust companies to pledge assets to receive public deposits, held not to permit agreement contrary to the statutory rule of distribution. (Ky. St. Sec. 165-a-17 and Sec. 579 as amended by acts 1932, c. 13.) In that case the court worked out the rule, under the statute, to its own satisfaction, although reasoning by analogy to

cases under the federal bankruptcy laws. (That case strikes at a contract, designed to adopt a rule of distribution in case of after occurring insolvency, in the face of a statute forbidding the plan of distribution agreed on, or purporting to be agreed on.)

ASSIGNMENT X. (Tr. p. 67.)

The court erred in finding and adjudging that the said collateral-security agreements of July 22, 1931, were given to secure or did or do secure the payment of any interest on the indebtedness of Lyon County Bank as it stood when said bank became insolvent and was taken over, as aforesaid, computed from any period after the said day of insolvency, taking over with knowledge as aforesaid.

It is important to observe that under the provisions of Exhibits B, C and D attached to the complaint (Transcript, pp. 16-21) the assets therein described were pledged by the Lyon County Bank "as collateral security for the payment of all of our present indebtedness to The Reno National Bank, of Reno, and all of the future indebtedness to said bank which we may incur hereafter from any cause or upon any consideration".

The assets in question, therefore, were pledged not specifically for the payment of the promissory note of July 1, 1931, but

(a) For the payment of the indebtedness of the Lyon County Bank to The Reno National Bank as of July 22, 1931; and

(b) For the payment of the future indebtedness of the Lyon County Bank to The Reno National Bank incurred after July 22, 1931.

It is our position that the rights of the defendant with respect to the securities are limited to the express provision of the collateral agreements of July 22, 1931, and if interest thereafter accruing is *not* to be considered as indebtedness thereafter incurred, then under the contract of the parties the described assets were not pledged for the payment of interest after July 22, 1931.

If, on the other hand, interest accruing after July 22, 1931, *is* to be considered as indebtedness thereafter incurred, then the statute bars the assertion of a lien for interest accruing after February 16, 1932, the date of the insolvency of the Lyon County Bank.

It would seem clear that the parties, in making their contract on July 22, 1931, considered that accruing interest would constitute an indebtedness thereafter incurred, as otherwise the collateral agreements would have provided no security whatever for future interest; and where contracting parties act within their legal rights the construction placed or intended by them upon expressions used in the contract should be given full consideration by the court in construing the same.

Counsel for the defendant has at all times conceded that this case is governed by the laws of the State of Nevada. The sections of the Nevada statute above quoted read in conjunction with the col-

lateral agreements are, in our judgment, absolutely conclusive of the issues of this case.

To repeat: The statute provides that no one "knowing of such taking possession by the examiner shall have a lien or charge for any * * * *liability thereafter incurred* against *any* of the assets of the bank of whose property and business the examiner shall have taken possession as aforesaid". (Italics ours.)

The agreements of July 22, 1931, provided that the notes and other assets were deposited with The Reno National Bank "as collateral security for the payment of all of our *present indebtedness* to The Reno National Bank, of Reno, and all of the *future indebtedness* to said bank, which we may *incur* hereafter". (Italics ours.)

It of course will not be seriously contended that the term "present indebtedness" as used in the collateral agreements would embrace all interest which might at any time in the future accrue due to the failure to pay the principal, or that this term would include *any* interest not already earned on July 22, 1931. It would of course be impossible for anybody to compute the amount of his "present indebtedness" at any time if interest thereafter to accrue on interest-bearing obligations should have to be included, for the reason that no one can foresee with certainty when such obligations will be paid nor for that reason can foretell how much interest may accrue in the meantime.

This point is illustrated in the *Montana* case of *Carlson v. City of Helena,* 102 Pac. 39, involving a construction of the constitutional provision regard-

ing the limitation of municipal indebtedness, wherein the court said:

"Much contention is made over the question whether the interest, as well as the principal, of the proposed issue of bonds should be taken into account in determining whether an indebtedness will be created thereby in excess of the 10 per cent limit authorized by the statute. If the interest should be taken into account and the amount of it be added to the $670,000. of principal, as counsel contend, the sum would exceed 10 per cent of the assessed valuation for 1907—the basis upon which it must be estimated—by several thousand dollars. The whole of the issue would then be void. This contention proceeds upon the theory that, when interest is expressly reserved in the contract, it becomes a part of the debt, and hence, in determining the amount of indebtedness which a city may contract by the issuance of bonds, the interest up to the date of maturity must be added to the principal. It is true that the reservation of interest is as much a part of the contract as the main promise (State Savings Bank v. Barrett, 25 Mont. 112, 63 Pac. 1030), yet no authority has been called to our attention which furnishes support for the rule contended for. Interest is merely an incident to the debt, to be paid from time to time or at the date when the principal falls due, in consideration of the forbearance extended to the debtor, and becomes a part of the debt, or a debt at all, only when it has been earned. If this is not the correct rule, then, as observed by the Supreme Court of Wisconsin in Herman v. City of Oconto, 110 Wis. 660, 86 N. W. 681, 'most of the cases in the books relating to the ascertainment of

municipal indebtedness have been wrongly decided'. The subject has frequently been considered by the courts of last resort in states having constitutional and statutory provisions similar to ours, supra, and the conclusion reached has been almost invariably against the contention here made. Herman v. City of Oconto, supra; Finlayson v. Vaughn, 54 Minn. 331, 56 N. W. 49; Kelley v. Cole, 63 Kan. 385, 65 Pac. 672; Blanchard v. Village of Benton, 109 Ill. App. 569; City of Ashland v. Culbertson, 103 Ky. 161, 44 S. W. 441; Gibbons v. Mobile & Great Northern R. Co., 36 Ala. 410; Jones v. Hurlburt, 13 Neb. 125, 13 N. W. 5; Epping v. City of Columbus, 117 Ga. 263, 43 S. E. 803; Durant v. Iowa County, 8 Fed. Cas. 117. See, also, 2 Abbott. Mun. Corp. Par. 160. All of these cases rest upon the principle that the authority granted by the Constitution or statute, as the case may be, to contract a debt, refers to the amount of the debt at the date at which it is created, and has no reference to the amounts of interest which accrue thereafter, and thus construe the fundamental law according to the sense in which the terms 'debt' and 'obligation' are used in the language of the common people."

Carlson v. City of Helena, 102 Pac. 39, at 44.

The rule is further set forth in Corpus Juris, as follows:

"The most common form of constitutional limitation of municipal indebtedness is that a municipal corporation shall not become indebted, or be allowed to become indebted, to an amount, including existing indebtedness, in the aggregate exceeding a specified percentage of the value of

> the taxable property therein * * * Accrued, but not unaccrued interest on obligations of a municipality is to be included in computing its indebtedness at a particular time."
>
> 44 C. J. 1121-24.

The question whether interest is a part of a debt, born with it, and when the liability to pay it is "incurred" receives illuminating treatment in the Nevada case of *State of Nevada v. Parkinson,* 5 Nevada Reports, pp. 17-27.

In that case the act of the legislature of 1869 creating a legislative fund was declared constitutional and it was specifically found that it did not violate the constitutional provision against contracting a public debt exceeding three hundred thousand dollars. The court held that the act in question did not "create" a debt.

Specifically the court held that the state tax anticipation warrants provided for, bearing interest at the rate of fifteen per cent per annum contemplated payments for governmental services and would create no debt and that the provisions for interest on them would not alter the situation, holding: "Interest constitutes no part of the original demand; it is simply a statutory allowance for delay."

As to the pertinent point in the instant case, the court says:

> "Defendant, however, contends that a different rule obtains when interest is allowed on warrants. If it be true that the issuance of a warrant creates no debt, and that no debt, within the pur-

view of the constitution, pre-existed, as would follow from the reasoning of the cases previously cited, how can the addition of interest make that an unconstitutional debt which was not so before? Interest constitutes no part of the original demand; it is simply a statutory allowance for delay. If the money be in the treasury, then no interest accrues; if not, the party holding the warrant is compensated for waiting until there is. It may be said that the allowance of interest presupposes a debt, for that there can be no interest except upon some principal; but upon the theory of the cases cited there is a debt, but not a debt repugnant to the constitution, as it is only contingent—a debt existent, but payable only upon the collection of revenues. In this view, as the interest follows the principal, that being contingent, so the interest. * * *"

State of Nevada v. Parkinson, 5 Nev. 17 (pages 27-28).

ASSIGNMENTS IV, V, VI. (Tr. pp. 64-65.)

IV.

The court erred in failing and refusing to find and adjudge that no interest on the indebtedness of Lyon County Bank to The Reno National Bank was payable, or could be charged or collected by The Reno National Bank, and that The Reno National Bank had no lien for any such charge, at any time, or for any period, after Lyon County Bank became insolvent and was taken over by the state bank examiner and The Reno National Bank had notice thereof.

V.

The court erred in finding and adjudging that after Lyon County Bank became insolvent and was taken over by the state bank examiner and The Reno National Bank had notice thereof, The Reno National Bank had the right to apply the avails from the collaterals deposited with it, to the discharge of any alleged interest computed over such subsequent period upon the amount of the indebtedness of Lyon County Bank as of the day the Lyon County Bank became insolvent and was taken over by the bank examiner and The Reno National Bank had notice thereof.

VI.

The court erred in finding and adjudging that it appeared from the exhibits in evidence, or was true, that after the defendant credited avails from collaterals mainly upon the principal of the note or indebtedness of Lyon County Bank that the balance due on the principal was one dollar ($1) and the balance due on the interest was $7698.52, both as of October 21, 1936; and the court erred in finding and adjudging that following the receipt of a letter of date December 16, 1936, from the Executive Assistant Counsel of the Comptroller of the Currency, the defendant made a revision of said previous endorsements "resulting in a balance due on principal as of October 21, 1936, of $9316.94", whereas in fact and in law said revision was not in conformity with said letter and said revision was not legal or proper and was incompetent to change the amount lawfully due by said

Lyon County Bank to The Reno National Bank on October 21, 1936, or fix it in the sum of $9316.94 or other sum, except as alleged in the complaint.

While we are admittedly governed in the instant case by the laws of the State of Nevada and not by the national laws, it is interesting to notice briefly the development of the rule concerning the payment of interest on secured claims in cases involving insolvent national banks. In *U. S. v. Knox,* 111 U. S. 784, 28 L. Ed. 603, Chief Justice Waite said in refusing to allow interest on a secured claim:

> "The business of the bank must stop when insolvency is declared. Rev. Stat. Sec. 5228. No new debt can be made after that. The only claims the comptroller can recognize in the settlement of the affairs of the bank are those which are shown * * * to have had their origin in something done before the insolvency. It is clearly his duty therefore, in paying dividends, to take the value of the claim at that time as the basis of distribution."

It will be observed that Chief Justice Waite classed interest accruing after the insolvency as a "new debt" and not to have had its "origin in something done before the insolvency". Certainly Justice Waite considered accruing interest as an "indebtedness thereafter incurred".

In *Merrill v. Nat'l Bank of Jacksonville,* 173 U.S. 131, 43 L.Ed. 640, the Supreme Court said:

> "Our conclusion is that the claims of creditors are to be determined as of the date of the declaration of insolvency, irrespective of the question whether particular creditors have security or not.

When secured creditors have received payment in full, their right to dividends and their right to retain their securities cease, but collections therefrom are not otherwise material."

Irrespective of statutes it is the universal general rule that in cases of bank insolvency the claim or debt can not be increased by interest after the date of closing, unless all can share likewise. So called "exceptions" to this rule will be found to be founded on statutes such as relating to trust funds, preferences properly allowed or dividends, improperly withheld or delayed and need not be considered in stating the general rule.

Fletcher Cyc. of Corporations (Permanent Edition), Vol. 16, Sec. 7937, p. 627 et seq.

"Interest on claims.

"As a general rule, after the property of a corporation has passed into the hands of a receiver, interest is not allowed on claims against the funds held by the receiver."

"As a general rule, under the various insolvency acts, state and federal, interest is not allowed on claims." (Page 628.) (Citing Thomas v. Western Car Co., 149 U.S. 95. Quoted in Samuels v. E. F. Drew & Co., 292 Fed. 734-736.)

"The reason for the general rule is that since the assets are almost invariably insufficient to pay the debts, calculations of interest are a waste of time." (Citing in notes to point that interest is allowed up to but not after the appointment of a receiver, First State Bank of Eastland v. Phelps (Tex. Civ. Ap.) 67 SW (2d) 900.

Citing in the notes in the supplement to page 628 Butts v. Gaylord State Bank, 282 N.Y. Suppl. 1, 5. Greva v. Rainey (previously cited here) 33 P(2d) 697. Calif.

"* * * interest will be allowed on secured debts if in conformity with the agreement under which security was taken." Page 632. (Citing Gamble v. Wimberly, 44 Fed. (2d) 329.)

Compare: Illegal agreement, City of Louisville v. Fidelity & C. Trust Co., 54 SW (2d) 40, cited herein before.

"* * * if interest has been prepaid by the insolvent corporation for any period subsequent to such appointment, such prepaid interest will be deducted from the amount of the claim as proved." Page 633. (Citing the author of Clark on Receivers article in 29 Yale L.J. 496.)

"Even though a creditor secured by a collateral may prove his claim for the full amount thereof without in any way taking into account such collateral, he cannot apply collections from collateral security which he holds to the liquidation of interest accruing upon his claim subsequent to the bank's insolvency, before applying such collections to the reduction of the principal of his claim." Page 634, note 54 citing Gamble v. Wimberly, 44 Fed. (2d) 329, paragraph 7.

Michie on Banks, Vol. III, page 216, Sec. 158, et seq.

"A preference can only arise by reason of some statutory provision or some fixed principle of common law which creates a special, superior right in certain creditors over others." Page 223, Sec. 163.

(See Commerce Trust Co. v. Farmers Exchange Bank 61 SW (2d) 928, to effect that the Missouri statute is exclusive.)

(See Louisville v. Fidelity etc. Co., 54 SW (2d) 40 (Ky.) as stating the statutory rule in Kentucky.)

(See Leach v. Sanborn State Bank, 231 NW 497 (Iowa) 69 A.L.R. 1206, involving a claim for interest which was denied.)

The Leach v. Sanborn case was governed by Sec. 9239, Code of 1927, which provides that the net assets of an insolvent bank "shall be ratably distributed among the creditors thereof, giving preference in payment to depositors".

"Receivership proceedings and priorities in the distribution of assets are governed by the statute in force when the receiver is appointed." Page 224, Sec. 163. (Citing Dickinson County v. Leach, 211 NW 542 (Iowa); Taylor v. Diercks, 39 SW (2d) 724. Statute.

"As against the assets of an insolvent bank, generally interest on a claim is calculated only to date of the suspension and vesting of the title of the assets in the receiver, unless there are surplus assets after paying the indebtedness. As between the creditors themselves, some cases hold that no interest is allowed upon their respective claims, whether preferred or unpreferred, after the appointment of a receiver." III Michie, Sec. 219, p. 329. Citing New York Security etc. Co. v. Lombard Invest. Co., 73 Federal 537, giving reason that otherwise creditors could profit by their own delay in making claims.

7 Corpus Juris 750, sec. 545.

As against bank, interest on claims is allowed from date of appointment of receiver or trustee. As between creditors, interest cannot be allowed so as to change their distributive rights. 7 C.J. 744, Sec. 532. Citing L. Nelson v. John B. Colegrove & Co. State Bank, 272 Ill. App. 258.

"The general principle of equity that the assets of an insolvent are to be distributed ratably among his general creditors, applies with full force to the distribution of the assets of an insolvent state bank." 3 R.C.L. 642, Sec. 272. "Banks".

In *Gamble v. Wimberly,* 44 Fed. (2d) 329, the court followed and emphasized the principle stated in the *Merrill* case (173 U. S. 131) but introduced a qualification in those cases where interest or dividends had been earned upon the collateral since the date of the debtor bank's insolvency and had been collected by the pledgee, in which case the pledgee was to be allowed to retain such collections and apply the same against the interest accumulated on the main obligation, to the extent that the interest so collected on the collateral did not exceed the interest accrued on the main obligation.

The foregoing decisions were based upon the provision of the National Bank Act to the effect that "ratable dividends" should be paid by the receiver out of the liquidated assets of the bank, and all of the federal decisions for many years followed the rule enunciated in *U. S. v. Knox* or as qualified in *Gamble v. Wimberly,* see:

(March, 1937) *Fash v. First National Bank of Alva, Okla.* (C. C. A. 10th), 89 Fed. (2d)

In 1918 subdivision (k) of Section 11 of the Federal Reserve Act was amended (Title 12 U. S. C. A. Sec. 248 (k)) by the act of September 26, 1918 (c. 177 Sec. 2, 40 Stats. 968), but this amendment was not construed by the supreme court for nearly twenty years or until the filing of the recent decision in the case of *Ticonic National Bank, Peoples-Ticonic National Bank, et al., Petitioners, v. Lottie F. Sprague and Margaret Davis Sprague,* 303 U. S. 362, 82 L. Ed. 630, wherein it was held that under the specific provisions of the statute as amended, the owners of funds held in trust for investment by national banks, have a lien upon the bonds or other securities, to their claim, for principal and interest accruing.

The *Sprague* decision, of course, has no bearing upon the instant case, but is limited to a construction of the 1918 amendment of subdivision (k) of Sec. 11 of the Federal Reserve Act. It relates to national banks acting as trustees and the character, extent and attributes of the lien that the owners of funds held for investment shall have in the event of failure of such bank, on the bonds or other securities for the protection of the funds so held in trust.

This amendment rests on a narrow ground and the decision notes an exception only to R. S. 5236 (Title 12 U. S. C. A. Sec. 194) concerning "ratable" distribution, finding no discrimination against other creditors.

The Comptroller of the Currency, in his letter of instructions to the defendant receiver, dated December 16, 1936 (Tr. pp. 162-6), contended that the defendant was entitled to retain interest earned on the

collateral following the insolvency and collected by the defendant, under the rule laid down in *Gamble v. Wimberly,* supra, and, while he did not instruct the defendant to alter the endorsements or applications theretofore made on the original paper, he requested that he be furnished with a statement reflecting the transaction under the rules enunciated in the *Gamble* case. Had the defendant followed such instructions, he would have found that the amount of interest earned after insolvency and collected by him and his predecessor bank would have amounted to $2,930.75, as shown by the court's finding No. IV. (Tr. pp. 57-8.) There can be no question as to the correctness of this amount, as it is based wholly upon the defendant's own testimony. (Tr. pp. 79-90.)

What procedure the defendant actually did follow in making his so-called "revision" and in reapplying the payments theretofore received as against either the subcollateral or the main obligation we are unable to fathom, and no intelligible explanation was offered by the defendant. However, as heretofore stated, his "revision" increased the amount of interest claimed to have been earned subsequent to insolvency and collected by him to the sum of $23,118.97 (Tr. p. 39), out of which he apparently pretended to reimburse himself in full for the amount of interest on the main obligation which he claims would have resulted had he applied the $23,118.97 as interest on the subcollateral, namely, $14,658.84, and leaving only a balance of something less than $9,000.00 of this $23,118.97 to apply toward the reduction of the principal. This of course is ridiculous.

The trial court was apparently somewhat confused by the whole proceeding, judging from its decision and from the findings which it ultimately signed, but it apparently ratified the so-called revision and re-allocation made by the defendant without giving serious consideration to (1) the method of original application; (2) the manner by which the various sums were collected; (3) the instructions given by the maker of the collateral and acquiesced in by the defendant; (4) the effect of such "revision" as between the defendant, the plaintiff and the makers of the various notes; (5) the instructions of the Comptroller of the Currency dated December 16, 1936; or (6) his legal right to make such re-application.

The trial court apparently attached much importance to the defendant's claimed "admission" of the collection of $14,658.84 in the form of interest on the pledged securities. (Tr. p. 42.)

At the trial, we selected one item at random and the testimony of the defendant (Tr. pp. 108-10) shows that, in the case of the H. E. Carter transaction, the original application of previous payments left a balance due on the Carter note on October 29, 1937, amounting to $873.05; that on that date he accepted from Mr. Carter the sum of $873.05 and surrendered his note to him; but that, according to his "revision", the balance which Mr. Carter would owe on October 29, 1937, would be $1,625.99 plus one year's interest on that amount at 8% per annum, or something over $1750.00 in all; that, after deducting the payment of $873.05 made by Mr. Carter on October 29, 1937,

there would still be a balance of approximately $875.00 owing on this collateral; that this approximate sum of $875.00 is included in the balance of $9,316.94 which the defendant claims is still due on the $60,500.00 promissory note; but that he is unable to turn over to the plaintiff the collateral of Mr. Carter showing a balance still owing of approximately $875.00 because he surrendered the same to Mr. Carter for some $873.05 at a time when he now claims the amount owing by Carter was in excess of $1,750.00.

Aside from the question of the legal right of the defendant to make a reapplication of these payments, which will be discussed shortly, the Carter transaction illustrates the absurdity of so doing and the extreme inequity which would result therefrom. The same analysis could be made of the other items, but the one brought into the open at the trial will serve to discredit the whole "revision" proceeding.

One who takes security assumes a trust. His rights extend to protecting himself. In so doing he must not liquidate any more of the security paper than necessary and he must not put it beyond the power of his debtor to realize on any of the security paper after the pledge has fulfilled its function. He is held to an accounting.

ASSIGNMENTS XI AND XIII. (Tr. pp. 67-68.)

XI.

The court erred in failing and refusing to find and adjudge that the so-called revision of credits and endorsements on the note of Lyon County Bank was illegal, improper and inadmissible and without the consent or authority of Lyon County Bank and was made to the detriment of Lyon County Bank and defendant was and is estopped to make or rely on any such so-called revisions.

XIII.

The court erred in failing to find or adjudge on the material issue, drawn in issue, respecting the legality of and warrant or lack thereof, for the so-called recasting and revising and reallocation of credits on the collaterals and on the primary obligation in accounting for the avails from the said collaterals, or the sufficiency of said accounting.

In this case, without conceding the accuracy of the tabulated record, the accounting and attempted reaccounting will not bear scrutiny. The purported reallocation of credits on the primary obligation, involving a new and substituted record of endorsements on the Lyon County Bank's pledged security paper and even involving the cancellation and surrender of paper belonging in equity to the Lyon County Bank, contrary to the contemporaneous history of the transactions themselves, is contrary to law.

Applications of payments, once made, cannot be changed except by mutual consent of the parties.

Palm v. Johnson (Tex. Civ. App.), 255 S. W. 1007;

Wait v. Homestead Bldg. & Loan Assn., 95 S. E. 203, 81 W. Va. 702.

Silence is not acquiescence.

Maxwell v. Providence Mut. L. Ins. Co. (Wash.), 41 Pac. (2d) 149.

"The creditor's right to make the appropriation applies only where the debtor has had an opportunity of exercising his right; and if payments are made on his account by a third person, or in such a way as to impede his right, the rule does not apply."

21 *R. C. L.,* p. 91, note 10.

"While a creditor is not obliged to make an appropriation immediately the payment is made, still where he does appropriate the payment in a particular way he is bound by his act and cannot afterwards change the application without the consent of the debtor, for the law regards the rights of the parties as becoming fixed at the time the application is so lawfully made in so far as the original debtor and creditor alone are concerned."

21 *R. C. L.,* p. 93, Sec. 97, notes 5, 6, 7 (citing cases).

One of the cases cited says:

"As the tree falls, so shall it lie".

U. S. v. Brent, 236 Fed. at 774.

See allied question on the right of a surety to have payments properly credited.

Wheeler & Stoddard v. Portland L. Co., 51 Nev. 53, 268 Pac. 46. Brief p. 61.

As to payments by debtors on the rights of guarantors:

"An application once made by the debtor or creditor to the debt for which the surety or guarantor is bound discharges the latter pro tanto, and he cannot be affected by a change of application by the creditor and principal debtor."

21 *A. L. R.* 712 (citing *inter alia*).

U. S. For Use of Jackson Ornamental Iron & Bronze Works v. Brent, 236 Fed. 771:

"Where a debtor makes a payment to a creditor to whom he owes two separate accounts, without directing its application, he thereby consents that the creditor may apply it to either account; and, when it is applied to one, a surety for such account is at once discharged from liability pro tanto, whether he has notice of the payment or not, and the credit cannot thereafter be transferred without his consent, although his principal and the creditor agree to the transfer." Syllabus 1.

Opinion in above, p. 774.

See:

96 *Am. St. Repts.* p. 75.

Note on change of application.

"Where a payment has been absolutely applied, it is irrevocable and cannot be changed: McMaster v. Merrick, 41 Mich. 505, 2 NW 895; Grasser etc. Co. v. Rogers, 112 Mich. 112; 67 A.S.R. 389, 70 NW 445, citing Chapman v. Commonwealth, 25 Gratt. (Va.) 721. The mere writing of an endorsement on the back of a note, without knowledge thereof by the maker, is not,

however, an irrevocable application of the money so endorsed, where there are other debts, Lau v. Blomberg (Ia.), 91 NW 206. The creditor, having made the application, cannot by his own act alone, change it: Wendt v. Ross, 33 Cal. 650; White v. Costigan (Cal.), 72 Pac. 178; Jackson v. Bailey, 12 Ill. 159; Hahn v. Geiger, 96 Ill. App. 104; Martin v. Draher, 5 Watts (Pa.) 544; Black v. Shooler, 2 McCord (S. Car.) 293; Eyler v. Read, 60 Tex. 387; Kinnear v. Dilley, 3 Wills Civ. Cas. Ct. App. (Tex.) Sec. 406; Chapman v. Commonwealth, 25 Gratt. 721; The Asiatic Prince, 108 Fed. 287 (CCA)."

From 96 *A. S. R.* 75.

"Where a creditor has applied a payment to a particular indebtedness and notified the debtor, who acquiesces therein, the application becomes a finality, and the creditor cannot thereafter change it without the debtor's consent."

Syllabus 1 from *The Asiatic Prince,* 108 Fed. 287 (C. C. A. 2d).

Looking at the matter realistically in the light of what was done or should have been done, we are required to ascertain the fact and the law rather than to inquire as to what the contesting litigants may say by means of an "account stated" as to what was done. Both of the two records here are subject to analysis as to mutual inconsistencies and as to the evidence of what actually took place.

It has been held that a court may vary the application of payments in the "interests of justice".

Carson v. Federal Reserve Bank of New York, 172 N. E. 475 (citing 62 L. Ed. 326).

It has been held that "Equity may require payments to be properly credited".

Whitehead v. Wicker, 280 S. W. 604 (Tex.).

The trial court, after announcing in its opinion the points presented for decision, evidently attempted to decide the issues presented, but we feel that it erred in two respects:

First, it stated (Tr. p. 46) that the complainant's contention under Sec. 53 of the Nevada Banking Act "is without merit as will hereafter appear". There is nothing further in the opinion which would make it appear that this contention was without merit. The Washington-Alaska Bank case certainly did not attempt to construe this section, as it had not even been enacted at the time the case was decided. In the case of *Douglas v. Thurston County,* the court merely held that that case must be decided under the laws governing the insolvency of national banks whereas the national bank laws were not applicable in the *Washington-Alaska Bank* case. The *Gamble v. Wimberly* case most assuredly does not seek to construe the Nevada Banking Act or any similar act. The *Ticonic National Bank* case was by its express terms based exclusively upon the language of the amended Federal Reserve Act. In the *Organ v. Winnemucca* case the question of interest was never even mentioned and, as the court expressly stated, the only matter submitted for consideration and decision was the question of law as to the validity of the pledge. The citations from 9 C. J. S. do not anywhere touch upon the question of the allowance or disallowance

of interest. We feel, therefore, that the court has cited no authority whatever to sustain its statement and that its contention in this respect is without merit.

Second, having decided, however, that the defendant might retain as interest upon the main obligation the income earned by the collateral after the date of insolvency and collected by The Reno National Bank and its receiver, we respectfully submit that the trial court did not give serious or any consideration to the testimony presented as to the amount of such income so earned and collected. It is true the court made its finding (Tr. pp. 57-8) that this amount was $2,930.75, but it immediately proceeded to disregard this specific finding and adopt and base its judgment upon all of the wild juggling of figures employed by the defendant receiver in making the latter's wholly illegal and wrongful revision and reapplication.

It all seems to have been very confusing both to the trial court and to defendant's counsel. For instance, in the proposed findings which the latter presented to the court he recites that "the sum of $14,658.84 had been collected as interest on said collateral securities accruing after the date of insolvency of said Lyon County Bank". (Tr. p. 50.) The trial court uses the same figure both in its decision and in its signed findings. (Tr. pp. 42 and 58.) Yet the amount shown as representing this item in the exhibit (Tr. p. 39) is $23,118.97 and this is the amount used by Mr. Butler, the defendant's bookkeeper, in his testimony. (Tr. p. 112.) Mr. Butler further testified

(Tr. p. 113) that the figure of $14,658.84 is not the correct amount of interest accrued and collected and applied on the main obligation. He added, "It is, under our revised set-up. That is what we want to do now".

Mr. Butler's further testimony (Tr. p. 113) is also illuminating to the effect that

> "I never made a compilation, split as to the date February 16, 1932 (date of suspension of Lyon County Bank) as to the interest actually accruing on this underlying security after the Lyon County Bank closed February 16, 1932,— or as to interest which accrued after that date and was collected after that date by Mr. Tobin."

Yet in the face of this testimony, and in the face of Mr. Tobin's testimony (Tr. pp. 79-90; Exhibit 2, Tr. pp. 159-160) showing that $2,930.75 was the total sum of interest which accrued on the subcollateral after the date of the Lyon County Bank's insolvency and which was collected by the defendant, and in the face of the court's specific finding IV (Tr. pp. 57-58) that this figure was correct, the court permitted the substitution of $14,658.84 to represent the amount of such interest so accrued and collected (Finding V, Tr. p. 58) and decided the case accordingly.

It is for reasons such as these that we are convinced that the merits of the respective parties, both with respect to the law applicable and as concerns a proper determination of the facts, have not received the consideration from the trial court which the cause merits and to which the parties were entitled.

On page 21 of this brief we have shown the amount for which the defendant should account to the plaintiff under the theory that the defendant's claim would draw no interest, as is our contention under Sec. 53 of the Banking Act. If, however, the rule in *Gamble v. Wimberly* were to be applied, then the payments received by the defendant would have been sufficient to retire the obligation of the Lyon County Bank on October 21, 1936, and leaving a surplus of $1,806.15, as of that date, and the defendant would then be accountable to the plaintiff for such surplus and for the following sums received thereafter:

On October 15, 1937, by E. S. Wedertz	$1,095.00
On October 29, 1937, by H. E. Carter	873.05

or the sum of $3774.20, together with the securities still in the defendant's possession.

ASSIGNMENTS XII AND XIII. (Tr. p. 68.)

XII.

The court erred in refusing to make the special findings timely requested by the complainant, notwithstanding such requested findings are supported by the weight of the evidence and the (67) evidence would support no finding or conclusion other than that requested by the complainant.

XIII.

The court erred in failing to find or adjudge on the material issue, drawn in issue, respecting the legality of and warrant or lack thereof, for the so-called recasting and revising and re-allocation

of credits on the collaterals and on the primary obligation in accounting for the avails from the said collaterals, or the sufficiency of said accounting.

While the trial court did sign special finding number IV (Tr. pp. 57 and 58) to effect that $2930.75 interest-avails from the collaterals in the period from February 16, 1932, to October 21, 1936, inclusive, the court nullified this concession by signing special finding number V (Tr. p. 58) to effect that the sum of $14,658.84 had been collected as interest on said collateral securities accruing after the date of insolvency of said Lyon County Bank (February 16, 1932).

The issue was a material one in the case and the court's two acts amounted to a failure and refusal to find and decide on a material issue in the case. Besides the evidence supports finding IV (Tr. pp. 57-58) and there is no evidence to support finding V. (Tr. p. 58.)

Furthermore, in the defendant's answer (Tr. pp. 23-25) there is a defense by way of counterclaim consisting of five paragraphs. (Tr. pp. 24 and 25.) These set up affirmatively the collection as interest on the collaterals of $14,658.84 (paragraph III) and the application of this sum on the primary obligation (paragraph IV). This defense and counterclaim is new matter and serves the purpose of a complaint on an allied matter.

In the complainant's reply (Tr. pp. 26-39) complainant set up an answer and defense to the new matter and counterclaim of defendant, consisting of one paragraph. (Tr. pp. 35-36.) This is the same as

an answer to a complaint and called for a reply, but the defendant did not reply.

The complainant alleged that the defendant had stated the account and had changed it after the complainant had altered its position, so that defendant is estopped to change the record of the transaction. For want of a reply traversing the facts alleged, they are deemed admitted.

That the claim of estoppel is recognized in law see as to shifting theory or record:

Adams, Receiver, v. Champion, Trustee in Bankruptcy, 294 U.S. 231-238.

The complainant objected (Tr. p. 130, paragraph VI) to the original finding VII (Tr. p. 127) proposed by defendant.

The complainant also proposed (Tr. p. 137) substitute finding number VIII reciting the statement of account made by defendant in 1937, the subsequent change in the record and the resulting detriment to Lyon County Bank.

When the court's final findings were signed the complainant objected (Tr. p. 148) to the omission of complainant's proposed findings of fact "VI, VII and VIII".

We contend that the issue as to the change in the record was material and that in refusing to finally determine that issue, or in refusing to find as requested, the court committed error. As above shown specific objections were made. Exceptions were allowed. (Tr. pp. 54-55 "Minutes".)

The requests were timely:

Century Indemnity Co. v. Nelson, 82 L. Ed. (U.S.) 535.

Compare:

Continental Nat. Bank v. National City Bank, 69 Fed. (2d) 312 (C.C.A. 9th).

In

Babbitt Bros. Trading Co. v. New Home Sewing Mach. Co., 62 Fed. (2d) 530-536,

it is said at 536:

"It should be stated also that the denial of a request for a special finding is not reviewable unless the request is based on the ground that the evidence will sustain no other conclusion, otherwise, the denial is the mere exercise of discretion not reviewable on appeal * * *"

See also

Union Bleachery Co. v. United States, 79 F. (2d) 549, Opinion, paragraphs 1 and 2.

We submit that in this case, after the court had written one opinion (Tr. p. 41; 23 Fed. Suppl. 763) covering a general judgment, that when special findings were requested and special findings (like a special verdict) were finally drafted, the omission of material special findings on material issues, is error.

CONCLUSION.

For the reasons stated it is respectfully submitted that the judgment and decree of the district court should be reversed.

Dated, Carson City, Nevada,
January 9, 1939.

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